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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 ARDY DEMETRIUS CHADWICK,

Civil No. 08-0768 WQH (WMc)

12  
13 Petitioner,

14 v.

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE**

15 SAN DIEGO POLICE DEPT.,

16 Respondent.

17 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas  
18 Corpus pursuant to 28 U.S.C. § 2254.

19 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

20 Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma  
21 pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or  
22 qualified to proceed in forma pauperis.

23 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

24 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner  
25 has failed to allege that his state court conviction or sentence violates the Constitution of the  
26 United States.

27 Title 28, United States Code, § 2254(a), sets forth the following scope of review for  
28 federal habeas corpus claims:

1 The Supreme Court, a Justice thereof, a circuit judge, or a district  
 2 court shall entertain an application for a writ of habeas corpus in  
 3 behalf of a person in custody pursuant to the judgment of a State  
 court only on the ground that he is in custody in violation of the  
 Constitution or laws or treaties of the United States.

4 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.  
 5 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800  
 6 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim  
 7 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of  
 8 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the  
 9 United States.” See 28 U.S.C. § 2254(a).

10 Here, Petitioner claims that the “cop gave me injury’s head injury’s busted ear drum and  
 11 lower back injury’s. I have sezzur’s and have to take pills for the rest of my life for what this  
 12 duty cop did to me.” (Pet. at 3.) In no way does Petitioner claim he is “in custody in violation  
 13 of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

#### 14 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

15 Further, habeas petitioners who wish to challenge either their state court conviction or the  
 16 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.  
 17 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial  
 18 remedies, a California state prisoner must present the California Supreme Court with a fair  
 19 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28  
 20 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court  
 21 remedies a petitioner must allege, in state court, how one or more of his or her federal rights  
 22 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:  
 23 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal  
 24 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the  
 25 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas  
 26 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the  
 27 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only  
 28 in federal court, but in state court.” Id. at 366 (emphasis added).

Nowhere on the Petition does Petitioner allege that he raised his claims in the California Supreme Court. In fact, he specifically indicates he did not seek review in the California Supreme Court. (See Pet. at 5.) If Petitioner has raised his claims in the California Supreme Court he must so specify. “The burden of proving that a claim has been exhausted lies with the petitioner.” Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); Oyler v. Allenbrand, 23 F.3d 292, 300 (10th Cir. 1994); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).

Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

The statute of limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for placement into the record] are in compliance with the applicable laws and rules governing filings.”). However, absent some other basis for tolling, the statute of limitations does run while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).


1 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
2 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to  
3 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.  
4 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal  
5 habeas relief because he has not alleged exhaustion of state court remedies.

6 **CONCLUSION**

7 Based on the foregoing, the Court **DISMISSES** this action without prejudice because  
8 Petitioner has 1) failed to pay the \$5 filing fee or move to proceed in forma pauperis; 2) failed  
9 to state a cognizable federal claim; and 3) failed to allege exhaustion of state judicial remedies.  
10 To have this case reopened, Petitioner must, **no later than July 10, 2008**, file a copy of this  
11 Order with the \$5.00 fee or with adequate proof of his inability to pay the fee, **AND** a First  
12 Amended Petition that cures the pleading deficiencies set forth above. **The Clerk of Court is**  
13 **directed to send a blank Southern District of California In Forma Pauperis Application**  
14 **and a First Amended Petition form to Petitioner along with a copy of this Order.**

15 **IT IS SO ORDERED.**

16 DATED: May 9, 2008

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18 **WILLIAM Q. HAYES**  
19 United States District Judge  
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